No. 88-171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PETER W. HERZOG and JOAN L. HERZOG,
Appellants,

vs.

SAM J. COLDING, as Collier County Property Appraiser, and the DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Appellees.

On Appeal From the Second District Court of Appeal, Lakeland Florida

APPELLANTS' SUPPLEMENT TO THEIR BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

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ON SEPTEMBER 1, 1988, THE SUPREME COURT OF FLORIDA ISSUED AN ADVISORY OPINION TO THIS COURT WHICH APPELLANTS BELIEVE IS RELEVANT TO THIS APPEAL AND SHOULD BE BROUGHT TO THIS COURT'S ATTENTION AS A SUPPLEMENT TO THEIR BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

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On September 1, 1988, the Supreme Court of Florida addressed a question of law certified from this Court in the case of *The Florida Star v. B.J.F.*, Case No. 87-329. The certified ques-

tion concerned the jurisdiction of the Florida Supreme Court to hear the appeal to that court as it related to the timeliness of the appeal to the United States Supreme Court. Since the Appellees in the instant case have similarly attacked the timeliness of this appeal, the opinion of the Florida Supreme Court in *The Florida Star v. B.J.F.*, No. 71-615 (Fla. Sept. 1, 1988) is relevant.

In *The Florida Star v. B.J.F.*, Appellee argued in her motion to dismiss the appeal before this Court that the opinion of the First District Court of Appeal was the final decision of the highest state court empowered to hear the cause and so, the time in which to appeal to the United States Supreme Court would run therefrom. *B.J.F.*, slip op. at 2-3. The Appellant, however, had appealed to the Supreme Court of Florida and judged that the state court remedies were not exhausted until such review was denied. Similarly, the Appellants herein moved the Second District Court of Appeal for a rehearing en banc and, accordingly, measured the time for appeal from the court's denial of their motion, after consideration thereof.

The Florida Supreme Court determined that it did have discretionary jurisdiction to hear the appeal in *B.J.F.* and that its jurisdiction was not complete until the court refused to exercise its discretion. *Id.* at 3-5. The court held that the denial of review did not retroactively remove the jurisdiction of that court, but merely marked the end of its jurisdiction. *Id.* at 5. In the case at bar, the Second District Court of Appeal was empowered to grant Appellants a rehearing en banc; the denial of this review did not reinstate the per curiam opinion as the court's last act. Rather, the order denying the rehearing en banc was the final decision which exhausted Appellants' state court remedies.

The Supreme Court of Florida in *B.J.F.* expounded upon the equitable principles which were considered in determining that jurisdiction is retained until a final review is denied and stated that:

> We confess that we are much influenced in this holding by the procedural quagmire that would result from a negative answer. To seek review of a state court judgment in the United States Supreme Court, a litigant first must exhaust all avenues of review available in the courts of the state. The fact that review in the highest court is discretionary is irrelevant; the litigant still must seek such review in order to proceed to the United States Supreme Court.
>
> It is therefore essential to the preservation of a litigant's right to United States Supreme Court review that he or she know with certainty the avenues of appellate review required by the courts of the state. If, after the fact, we held in a case such as this that there was no jurisdiction, litigants would be placed in a needlessly burdensome position. A party would have to try to predict which court ultimately would recognize jurisdiction in the case and file a petition for review accordingly.

Id. (citations omitted).

The argument of Appellees herein, that the order denying Appellants' motion for rehearing en banc was not the last act of the Second District Court of Appeal, contravenes equitable principles. An acceptance of Appellees' argument would result in the same procedural confusion berated by the Florida Supreme Court in *B.J.F.* Appellants relied on the representations contained on the face of the Second District's order, clearly demonstrating that the court had accepted jurisdiction, had considered Appellants' motion and had denied same. The Second District did not dismiss the motion for lack of jurisdiction, which would have alerted Appellants to make an earlier filing in this Court as Appellees now contend should have been done. Litigants cannot be required to second-guess the representations made by the Florida courts. Thus, the order of April 27, 1988 must be deemed the last jurisdictional act in Florida.

CONCLUSION

For all of the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

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